No. 13031

# In the United States Court of Appeals for the Ninth Circuit

SAM ZALL, AN INDIVIDUAL D/B/A SAM ZALL MILLING CO., PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

*ON PETITION FOR REVIEW AND REQUEST FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD*

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD


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## AUTHORITIES CITED

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### JURISDICTION

This case is before the Court upon petition of the Sam Zall Milling Co. to set aside, and cross petition of the National Labor Relations Board for enforcement of, a Board order issued against the Company on June 29, 1951, pursuant to Section 10 (c) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. IV, Sec. 151, *et seq.*).[1] The Board's decision and order (R. 39) are reported at 94 NLRB 1749. This Court has jurisdiction under Section

[1] Relevant portions of the Act appear in the Appendix, *infra*, pp. 24–26.

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10 (e) of the Act, because the unfair labor practices in question occurred within this judicial circuit in the course of the Company's operations in Marysville, California.

## STATEMENT OF THE CASE

### I. The Board's findings of fact and conclusions of law

Briefly, the Board found (R. 41–45) that the Company violated Section 8 (a) (5) of the Act by refusing to honor the Union's (American Federation of Grain Millers (A. F. of L.)) request for bargaining and by dealing directly with its employees and unilaterally changing the terms of employment despite the fact, known by the Company, that the employees had selected the Union to represent them. The Board found further (R. 40) that the Company violated Section 8 (a) (1) of the Act by interrogating its employees concerning their union affiliation, by granting them benefits and by negotiating directly with them concerning terms of employment for the purpose of inducing them to abandon the Union.

The facts as found by the Board, and as shown by the evidence, may be summarized as follows:[2]

#### A. The Company's operations

Zall is engaged in the production and sale of animal and poultry feeds in Marysville, California (R. 67–68). During all relevant periods he purchased,

[2] In the following statement, record references preceding the semicolon are to the Board's findings; references following the semicolon are to the supporting evidence. The symbol "R." refers to the printed transcript of Record, referred to in the Company's brief as "Tr.". The symbol "S. R." refers to the printed Supplemental Transcript of Record.

grains, alfalfa, concentrates and other materials valued at more than $250,000 annually, of which more than $90,000 was shipped to him from points outside the State of California (R. 61–62).

The total annual sales of the Company approximated $500,000 in value during the periods here involved. All of these sales were made in California to purchasers within the State. However, Zall's largest single customer, the Vantress Hatchery and Breeding Farms, was itself engaged in interstate trade. In 1949, Zall sold to the Vantress Company poultry feeds valued at more than $75,000. The Vantress Company used these feeds in the production of poultry and eggs at its farm near Marysville. During 1949 and 1950 the Vantress Company sold and shipped annually to points in the United States outside of California, hatching eggs valued at more than $60,000 (R. 62–67).

Upon these facts the Board found, contrary to the Company's view, that its operations affect commerce within the meaning of the Act, and that it would effectuate the purposes of the Act to assert jurisdiction over the case (R. 40, n. 1).

### B. The unfair labor practices

#### 1. *The Company's employees designate the Union as their representative*

During the fall of 1950 Zall employed seven production workers[3] (R. 21; 68–79). In September and October 1950, at the solicitation of Union organizers Gam-

[3] The Board found that these seven employees constitute a unit appropriate for the purposes of collective bargaining (R. 41, n. 4, 18–21). The Company does not contest this finding (R. 54).

ble and Hanifin, five of the seven employees signed cards applying for membership in the Union and designating the Union as their representative for collective bargaining purposes (R. 21–24; 88–93, 138–140, 143–145, S. R. 195–196).

*2. Zall refuses to bargain with the Union*

On September 26, at the inception of the Union's organizing activities, and when only one employee had signed an application card, Union organizers Gamble and Hanifin called upon Sam Zall at the plant. The organizers told Zall in substance that they planned to organize his shop. Zall said, "I don't want a union here and my people do not need a union." Gamble told Zall that he would change his views after they were better acquainted. In the course of the conversation Gamble gave Zall a blank copy of the Union's Master Agreement which the Union regularly used as a basis for negotiation, and asked Zall to study it so that they could discuss it a week or two later. Zall agreed to this and the conversation ended (R. 24; 85–89, 108–109, 155–156).

About a week later, on October 3, having secured designations from a majority of the employees, Gamble and Hanifin returned to the plant and told Zall they "would like to negotiate" (R. 157). Zall replied that he "wasn't interested in negotiating" (*ibid.*). Gamble thereupon asked him if he would consent to an election if the Union had over 30 percent of the employees signed up. Zall parried this question by asking whether the Union did in fact represent that percentage. Gamble said that it did, but when asked to reveal the names of the members he stated that he would do so only under

the auspices of the Board. Zall thereupon declared that his position on unions was unchanged and the conversation ended (R. 25–26, 41–42; 93–95, 156–159).

***3. After learning of his employees' union affiliation Zall bypasses the Union, engages in direct negotiations with the employees and grants them substantial benefits in order to induce them to abandon the Union***

Directly after Gamble and Hanifin left the plant on October 3, 1950, Zall asked each of his employees whether they had signed Union cards (R. 26, 40; 160–161, 126–127, 138–139, 144; S. R. 199–200, 205–206). All of the three employees who were witnesses at the hearing testified that they told Zall that they had signed cards (R. 26, 43; 138, 144–145; S. R. 199–200, 205–206) and one of the three told Zall that he had seen the "rest of" the employees sign up. (S. R. 205–206).[4] The Company thereupon proceeded to side-step the Union and negotiate directly with the employees. During the next few days, Cotton, Zall's supervisor in charge of production (R. 69–70), held conversations with the employees to inquire about their grievances and learn what they wanted in terms of wages, hours and other conditions of work. On October 5, as a result of these talks Cotton drew up a rough draft of a contract by which the Company agreed to meet various employee demands. The same

[4] Employee Adams testified as follows in this connection (S. R. 205–206): "Well he [Zall] come out and asked me, he says, 'Did you sign that card?' I said 'yes.' He said, 'Well, you want the Union.' I said, 'Well its not me, the rest of them signed, too.' He said 'Well you and Matthews are the only ones who said you signed.' So I told him, 'I was there, I know that the rest of them did, too.' So he went up to where Skinner was working and I imagine to ask him."

day, he discussed this document at a meeting with the men. They indicated that it was satisfactory. The next day, Zall himself read the draft to the men. In the course of the ensuing discussion Zall said, "If you sign this contract then you boys know how I would like to have you vote" (R. 147). After the men approved, Zall had the draft contract typewritten. It was signed by Zall in his office and then circulated among the employees for their signatures. Five of the seven men signed the document (R. 26–28, 43–44; 136–137, 127–130, 145–146, 149–150, 158–161; S. R. 196–199, 203–205).

By this document (R. 136), which was captioned "Contract," Zall agreed to increase the wages of the signatory employees to the level paid by General Mills Corp., another mill in the nearby area (R. 27; 129–130). Zall also agreed to permit employees to work in excess of forty hours per week, thus enabling them to earn overtime pay. This represented a departure from Zall's earlier practice of meeting emergency situations by bringing in part-time workers from the outside (R. 27; 79–81, 133–135). The contract was put into effect immediately and the employees received the increased wage rate, effective as of October 2 (R. 28; 127, 130).

Following these events, the Union on October 16 withdrew a petition for an election which it had filed with the Board on October 4 (R. 26; 93–96) and filed, instead, a charge that Zall had committed the unfair labor practices here involved.

### II. The Board's conclusions

The Board concluded (R. 28–31, 41–44) that the Union had been properly designated as the employees' statutory bargaining representative, and that Zall had refused to recognize and bargain with the Union, in violation of Section 8 (a) (5) of the Act, by refusing to honor the Union's bargaining request, and by bypassing the Union and bargaining on an individual basis with the employees and unilaterally changing wages and other conditions of employment as a result of such individual negotiations. The Board also found (R. 32, 40), independently of the above finding, that Zall's direct negotiation with the employees and grant of benefits, in the face of the Union's designation as exclusive bargaining representative, as well as his questioning of the employees concerning their union activities, all for the purpose of inducing the employees to abandon the Union, constituted interference, restraint, and coercion in violation of Section 8 (a) (1) of the Act.[5]

### III. The Board's order

The Board's order (R. 45–48) requires Zall to cease and desist from refusing to bargain collectively with the Union as the exclusive representative of his employees, cease and desist from giving effect to the agreement made with his employees in order to forestall bargaining, and from in any other manner, inter-

[5] The Board's decision that Zall violated Section 8 (a) (1) of the Act was unanimous (R. 48). Since Board Member Murdock felt that the Union had not made a proper request for bargaining, he dissented from the Board's finding that respondent had refused to bargain upon request, in violation of Section 8 (a) (5) (R. 48).

fering with, restraining, or coercing his employees in the exercise of their rights under Section 7 of the Act. Affirmatively, the Board's order requires Zall, upon request, to bargain collectively with the Union and to notify the individual employees that he will not enforce the individual agreements for the purpose of interfering with collective bargaining, and finally to post the usual notice.

## ARGUMENT

### I

### The Board properly held that the Zall Milling Company is engaged in commerce within the meaning of the Act

The Board asserted jurisdiction over Zall on the basis of the fact that it sells annually, to the Vantress Corp. in California, feeds valued at $75,000, and that the Vantress Company uses this feed in the production of hatching eggs which it ships in interstate commerce (R. 40, n. 1). While conceding that its largest feed customer, the Vantress Company, produces and sells hatching eggs in interstate commerce, Zall argues that the Board lacks jurisdiction over it because the feed itself never enters the channels of interstate trade but loses its character as feed when it is fed to the hens of the Vantress Company in California. As Zall puts it, "The chicken feed never directly or indirectly reaches the eggs, which are the products shipped in interstate commerce and serves only to increase the inherent laying power of the hen." (Br. p. 6.)[6]

[6] Zall states (Br. p. 4) that the Vantress Company is not subject to the jurisdiction of the National Labor Relations Act and cites as a record reference "Tr. p. 67." Nothing at the page cited

Assuming the biological accuracy of Zall's contention,[7] it is plain that he nevertheless falls well within the area of the Board's jurisdiction. It is elementary law that the Act reaches all operations which, though confined to a single state, have an effect upon interstate commerce. Sections 1, 2 (5) and (6) of the Act; *N. L. R. B.* v. *Fainblatt,* 306 U. S. 601, 604; *N. L. R. B.* v. *Sunshine Mining Co.,* 110 F. 2d 780, 784–785 (C. A. 9), certiorari denied, 312 U. S. 678; *N. L. R. B.* v. *Townsend,* 185 F. 2d 378, 382 (C. A. 9), certiorari denied, 341 U. S. 909; *N. L. R. B.* v. *Cleveland Cliffs Iron Company,* 133 F. 2d 295, 299–300 (C. A. 6). Since, as respondent admits (Br. pp. 4–5) his feed enhances the productive power of the Vantress hens, it follows that a curtailment of the supply of feed by a labor dispute at respondent's plant would discourage the output of eggs at Vantress and thereby affect commerce.

Thus, even if it be true, it is irrelevant that neither the feed nor its chemical components enters the

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or in the record warrants this statement. Perhaps, he is referring to the fact that the General Counsel stipulated (R. 64) that Mr. Vantress, if called, would "testify that he is not subject to Wages and Hours Law." Zall does not explain, how this fact, even if true, could affect the Board's jurisdiction. The Board noted (R. 17) that nothing in the Act suggests "that Congress intended to exempt from the Board's jurisdiction employers engaged in *industrial activity* necessary to the production of agricultural commodities which move in commerce." [Emphasis added.]

[7] It is highly questionable whether Zall's position in this regard is scientifically correct. While undoubtedly the feed undergoes chemical and physical change in the process of digestion, the accepted scientific fact is that the egg is formed from the components of the feed. United States Department of Agriculture, *Nutritive Requirement and Feed Formulas for Chickens, Circular No. 788.*

streams of commerce in the form of the egg. The product itself need not enter the flow of interstate trade, it is enough that, as here, the product or service constitutes an essential factor in the production of other goods which do move in commerce. Thus, production of water, gas, electricity, and fertilizer for purely local consumption has been held to come within the commerce provisions of the Act and other Federal statutes, where these products or services were assimilated locally by companies engaged in production for interstate commerce. *Roland Electrical Company* v. *Walling,* 326 U. S. 657, 663; *Reynolds et al.* v. *Salt River Valley Water Users Assn.,* 143 F. 2d 863, 865–867 (C. A. 9); *Consumers Power Co.* v. *N. L. R. B.,* 113 F. 2d 38, 39–41 (C. A. 6); *McComb* v. *Super-A-Fertilizer Works,* 165 F. 2d 824, 825–828 (C. A. 1). By the same token, production of feed, which is consumed locally by hens which produce hatching eggs for interstate shipment, affects commerce within the meaning of the Act.[8]

[8] Zall imported close to $100,000 worth of materials from out of state (*supra*, p. 3). Although the Board could have properly asserted jurisdiction on the basis of this fact alone (*N. L. R. B.* v. *Denver Building Council*, 341 U. S. 675, 683–684; *N. L. R. B.* v. *Cowell Portland Cement Co.*, 148 F. 2d 237, 241–242 (C. A. 9), certiorari denied, 326 U. S. 735; *N. L. R. B.* v. *Ellis-Klatscher & Co.*, 142 F. 2d 356, 357 (C. A. 9)), it does not as a matter of policy rely on the intake factor unless the value of the goods received is $500,000 or more. See "N. L. R. B.'s Standards for Exercise of Jurisdiction," 26 L. R. R. M. 50; Sixteenth Annual Report of the National Labor Relations Board, 1951, pp. 15–16.

## II

### Substantial evidence supports the Board's finding that the Company violated Section 8 (a) (1) and (5) of the Act

#### A. The violation of Section 8 (a) (1)

As we have already noted (*supra,* p. 7), the Board found that independently of its refusal to bargain with the Union, in violation of Section (a) (5) of the Act, the Company, in violation of Section 8 (a) (1), interfered with its employees' right to organize and bargain collectively, by interrogating them concerning their union affiliation, and by dealing directly with the employees and granting them benefits for the purpose of inducing them to abandon the Union (R. 40–43). The Company does not challenge the propriety of the Board's finding with respect to the violations of Section 8 (a) (1). It filed no exceptions to the Trial Examiner's finding that it committed these violations (R. 54) nor does it argue these matters in its brief to this Court. Hence, under Section 10 (e) of the Act [9] and well established principles governing appellate procedure [10] this issue is not before the Court. In any event there is little doubt that Zall's admitted interrogation, direct negotiations, and grant

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[9] This Section provides that "No objection that has not been urged before the Board, its members, agent, or agency, shall be considered by the Court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." See *Marshall Field & Company* v. *N. L. R. B.*, 318 U. S. 253, 255; *N. L. R. B.* v. *George Norvian Company*, 193 F. 2d 172, 173 (C. A. 9).

[10] *Mason* v. *Anderson-Cottonwood Irrigation District*, 126 F. 2d 921, 922 (C. A. 9); *N. L. R. B.* v. *Kentucky Utilities Co.*, 182 F. 2d 810, 814 (C. A. 6).

of benefits, coming as they did, fast on the heels of the union's designation as bargaining representative by the majority of the employees, constituted interference in violation of Section 8 (a) (1) of the Act.[11] The remaining issue before the Court is whether the Board correctly found that the Company also failed to fulfill its bargaining obligation under Section 8 (a) (5) of the Act. We now turn to that question.

**B. The Company's failure to fulfill its bargaining obligation under Section 8 (a) (5)**

The Board found (R. 31), as we have seen, that the Company violated its obligation to bargain in two respects—it failed to honor the Union's request to bargain and, in addition, bypassed the Union and engaged in direct dealings with its employees at a time when it knew that the Union represented a majority of the employees.

***1. Zall's refusal to honor the Union's request for bargaining and recognition violated Section 8 (a) (5)***

With respect to the refusal to honor the Union's request for bargaining, the issue is whether substantial evidence supports the Board's finding that the Union, in fact, made such a request. We submit that the majority of the Board correctly so found (R. 41–44).

At their first meeting with him, in late September, the Union agents did not merely inform Zall that they planned to organize his employees. They left with

[11] *Medo Photo Supply Corp.* v. *N. L. R. B.*, 321 U. S. 678, 683; *J. I. Case Company* v. *N. L. R. B.*, 321 U. S. 332, 337; *May Department Stores Co.* v. *N. L. R. B.*, 326 U. S. 376, 384–385; *N. L. R. B.* v. *Andrew Jergens Co.*, 175 F. 2d 130, 136 (C. A. 9), certiorari denied, 338 U. S. 827.

Zall a copy of the "Master Agreement," which the Union regularly used as a basis for negotiations and which, with variations to suit each particular case, was the contract the Union normally executed with employers whose workers it represented (R. 42). Moreover, Zall agreed to study the contract so that they could meet again within the next two weeks for further discussion (R. 25; 88). Zall himself testified that the Union agents "brought up the subject of a possible contract between me and themselves as representing the men, and words to that effect," but that he told them that he "personally was not interested in having a union contract negotiated for" (R. 155–156).

It was against this background that the parties met again on October 3, after the Union had been designated bargaining representative by a majority of the employees. At the latter meeting, as Zall testified (R. 157) the Union agents "stated that they would like to negotiate." Zall, however, again declared that he "wasn't interested in negotiating" (*ibid.*). At this point the Union agents said that "in that case [they] would have to have an election" (R. 42; 157) and asked Zall if he would consent to one (*supra,* p. 4). As the Board found (R. 43), the Union's action in this respect is not inconsistent with the conclusion that the Union agents were seeking immediate recognition when, at the outset of the October 3 meeting, they asked Zall to negotiate. The Board could reasonably conclude, as it did (*ibid.*), that the Union's suggestion of a consent election, after Zall had declined their request to bargain, was simply "an alternative attempt to achieve recognition without resorting to charges of unfair labor practices."

It was equally reasonable, we submit, for the Board to conclude on all the facts that Zall understood that the Union agents were making a bargaining request when they met with him on October 3. Indeed, the very fact that they had given him the form contract to study, that the contract expressly provided for exclusive recognition of the Union, and that the Union agents upon returning on October 3, declared that they "would like to negotiate," together with Zall's admission that he then told the Union representatives that he "wasn't interested in negotiating," makes it difficult to reach any other conclusion. Clearly these facts satisfy the statutory requirement of a request to bargain. The very nature of the collective bargaining scheme under the Act precludes any requirement of formalism in the request. The courts have recognized, therefore, that the request need not be in "*haec verba,* so long as there was one by clear implication." *Joy Silk Mills, Inc.* v. *N. L. R. B.,* 185 F. 2d 732, 741 (C. A. D. C.), certiorari denied, 341 U. S. 914. All that is necessary is that "the employees must at least have signified to [the employer] their desire to negotiate." *N. L. R. B.* v. *Columbian Enameling & Stamping Co.,* 306 U. S. 292, 297–298.[12]

The Company, relying on Board Member Murdock's dissent as to the 8 (a) (5) Finding (see p. 7, n. 5), advances the argument (Br. pp. 13–15) that Zall's testimony to the effect that the Union wanted to

[12] In the *Columbian Enameling* case the court held the request inadequate, because, unlike the request here, it was made by two conciliators of the Department of Labor who did not purport, and were competely devoid of authority, to act for the employees.

negotiate must be interpreted as having reference to the negotiation of a consent election agreement, not a collective bargaining agreement. This interpretation, however, hardly squares with Zall's testimony. Zall testified as follows (R. 157):

> I don't recall word for word what was said. Mr. Gamble or Mr. Hanifin stated that they would like to negotiate, and I told them that I wasn't interested in negotiating, *and then they said,* I believe, that in that case we would have to have an election * * * [Italics supplied].

Zall then testified that the organizers explained the election procedure to him and that, as they were getting ready to leave, he said "Well go ahead and file for your election" (R. 157).

In our view, it is difficult indeed to construe Zall's statement at the outset of this conversation that he "wasn't interested in negotiating" as meaning that he was not interested in negotiating a consent election agreement. The discussion of elections came up only after Zall indicated his unwillingness to bargain generally. Moreover, it is extremely unlikely, that Zall could have been referring to negotiation of a consent election agreement, a relatively technical matter, in the light of his own admission that the whole election process was "all new" to him (R. 157).

The other contention advanced by Zall, that he was justified in refusing to bargain because the Union failed to claim and prove its majority status, is altogether without merit and was properly rejected by

the Board (R. 41–44). In the first place, as the Board noted, the Company was effectively put on notice of the Union's claim to majority status by the contract itself, which expressly required recognition of the Union as the sole collective bargaining agent of the employees in question (R. 42; 98).

In the second place, the fact that the Union did not proceed to prove its majority status was by no means the real cause of Zall's rejection of the Union's bid. On the contrary, Zall was motivated by a fundamental opposition to bargaining at all. At both meetings with the Union he stated that he did not need a union and "wasn't interested in negotiating," before any discussion of the Union's representative status arose.

Moreover, Zall, by his later unfair labor practices demonstrated that he never had any intention of bargaining in good faith, regardless of the majority status of the Union. Thus, he promptly interrogated each of the employees and learned first hand, albeit improperly, that the Union was in fact supported by a majority of the employees (*supra*, p. 5).[13] Instead of respecting the Union's status, however, and responding to its bargaining request, Zall immediately set about to destroy the Union's majority by dealing directly

[13] All three employees who testified, stated without contradiction that they told Zall that they had joined. One of these three testified that he told Zall that he had seen the other employees also sign. Zall never denied that the employees he had questioned told him they had joined the Union. Instead he simply stated that upon interrogating the employees he "got his answer" (R. 160–161). The Board could properly conclude that Zall "had reason to know on October 3rd, that the Union actually had been selected as the majority bargaining representative of his employees" R. 43).

with the employees and awarding them benefits he was unwilling even to discuss with the Union. In these circumstances there can be little question but that the Board could reasonably reject, as it did (R. 41–44), Zall's claim that he had a sincere doubt as to the Union's majority and refused to bargain for that reason. *N. L. R. B.* v. *Bradford Dyeing Assn.*, 310 U. S. 318, 338–340; *N. L. R. B.* v. *Biles Coleman Lumber Co.*, 98 F. 2d 18, 22 (C. A. 9); *Joy Silk Mills, Inc.* v. *N. L. R. B.*, 185 F. 2d 732, 741–742 (C. A. D. C.), certiorari denied, 341 U. S. 914; *N. L. R. B.* v. *National Plastic Products Co.*, 175 F. 2d 755, 760 (C. A. 4); *N. L. R. B.* v. *Consolidated Machine Tool Corp.*, 163 F. 2d 376, 378–379 (C. A. 2); cert. den., 332 U. S. 824; *The Solvay Process Company* v. *N. L. R. B.*, 117 F. 2d 83, 86 (C. A. 5), cert. den., 313 U. S. 596.

The Company's contention (Br. pp. 14–15) that the employees did not intend to authorize the Union to bargain on their behalf warrants only brief attention. The cards in bold-face type and in plain language designate the Union to act as representative. (R. 102–106.) The Union agent explained the contents of the card to the employees (R. 113, 124–125, 151–152). The Board correctly ruled (R. 22–23, 41), that the employees who signed these cards could not undo the effects of their overt action by testifying that they thought the cards meant something else. *N. L. R. B.* v. *Sunshine Mining Co.*, 110 F. 2d 780, 790 (C. A. 9), certiorari denied, 312 U. S. 678; *Joy Silk Mills, Inc.* v. *National Labor Relations Board*, 185 F. 2d 732, 743, certiorari denied, 341 U. S. 914 (C. A. D. C.); *Consolidated Machine Tool Corp.*, 67 N. L. R. B. 737, 739, enforced, 163 F. 2d 376 (C. A. 2), certiorari denied, 332 U. S. 824.

In any event, it is fair to assume even if, as the Company contends (Br. p. 15), the "signatures were for the limited purpose of permitting the Union to file a petition and bring about an election," that the employees' ultimate purpose in seeking such an election was to have the Union represent them. It is extremely unlikely that these employees were authorizing the Union to file for an election so that they could then vote against it.

***2. The Company's direct negotiations with the employees and unilateral change of working conditions violated Section 8 (a) (5) of the Act, even assuming that the Union had not made a bargaining request***

The statutory bargaining obligation not only imposes the affirmative duty to bargain collectively upon request, but in a negative sense it requires the employer to abstain from undercutting the designated representative by direct dealings with individual employees and unilaterally changing terms and conditions of employment. *Medo Photo Supply Corp.* v. *N. L. R. B.*, 321 U. S. 678, 683, 684.[14]

Once a collective bargaining representative has been designated by a majority of the employees, either party, union or employer, wishing to change the terms or conditions of employment must seek out the other for bargaining concerning the proposed changes. If the Union wishes to negotiate a contract or a change in terms of employment it must, preliminarily, re-

[14] Accord: *National Labor Relations Board* v. *Jones and Laughlin Corp.*, 301 U. S. 1, 44; *N. L. R. B.* v. *Crompton-Highland Mills*, 337 U. S. 215, 255; *N. L. R. B.* v. *Montgomery Ward & Co.*, 133 F. 2d 676, 681–682 (C. A. 9); *N. L. R. B.* v. *Andrew Jergens Co.*, 175 F. 2d 130, 136 (C. A. 9), certiorari denied, 338 U. S. 827.

quest the employer to bargain concerning such change, and the employer must, under the law, meet and bargain in good faith. Similarly, if the employer wishes to change terms or conditions of employment, he must request a meeting with the Union which the Union must honor (Section 8 (b) (3)). Hence, it is idle for respondent to argue as to this aspect of the case, that the Union had not requested bargaining, for even if this be true (which we deny, *supra,* pp. 12–15), it does not afford any defense to respondent for its failure to seek out the Union prior to its negotiation with the individual employees and its unilateral initiation of changed terms of employment. Under the controlling authorities, the Company was obligated to make a bargaining request as a prelude to its changing the terms of employment. *N. L. R. B.* v. *Crompton-Highland Mills, Inc.,* 337 U. S. 217, 223–224; *Allis-Chalmers Mfg. Co.* v. *N. L. R. B.,* 162 F. 2d 435, 440 (C. A. 7), enforcing 70 N. L. R. B. 348, 369; *Reeder Motor Co.,* 96 N. L. R. B. No. 112, 28 LRRM 1596, and authorities cited *supra* at page 18.

Here, although Zall had been put on notice of the Union's majority status by virtue of the majority clause in the contract and the results of his interrogation of employees, he was still not willing to bargain with the Union. Indeed, the fact that the Union had been designated by the employees seemed to crystallize his opposition to the Union. He promptly sought to induce the employees to abandon the Union by offering to the men directly a contract, where none existed before, providing for increased wages and overtime work. This action was "manifestly incon-

sistent with the principle of collective bargaining" prescribed by the Act, and as the Board found (R. 40–44) constituted a violation not only of section 8 (a) (1) (*supra,* p. 7), but also of Section 8 (a) (5). The *Crompton* case, *supra,* 337 U. S., at pp. 221–222.

#### 3. The *Valley Broadcasting* case

The Company relies heavily upon *N. L. R. B.* v. *Valley Broadcasting Co.,* 189 F. 2d 582 (C. A. 6) (Co. Br. p. 12), in support of its position that the Union here never made an adequate bargaining request. We submit, however, that the *Valley* case is distinguishable on its facts. The Court, in the *Valley* case (at p. 586), found that there was no substantial evidence that "the Union through Hirsch [the Union agent] ever presented respondent with a clear demand to bargain." The Board had also found (87 NLRB, at p. 1144, n. 1) that Union Agent Hirsch had failed to make an adequate request, and relied for its finding of a bargaining request on a statement made by an employee Union member (Teolis) in the course of a meeting with the employer (87 NLRB at pp. 1144–1145). In these circumstances, we believe, it is fair to assume that the Court, in the *Valley* case, was not satisfied that a proper request could be made by a mere employee who had no real or apparent authority to act for the Union. Hence, it found (189 F. 2d, at p. 586), that the Union had never "presented respondent with a clear demand to bargain." Cf. *N. L. R. B.* v. *Columbian Enameling & Stamping Co.,* 306 U. S. 292, 297–298. In the instant case the bargaining request was made by the Union organizers themselves

and hence is not subject to the defect found in the bargaining request in the *Valley* case. In any event, the question of fact here involved must turn upon the particular circumstances of the case itself which, as we have already shown, fully support the reasonableness of the Board's conclusion that the Union clearly acquainted Zall with its desire to bargain collectively on behalf of his employees.

Although the Court in the *Valley* case rejected the Board's finding that the Company had violated Section (a) (5) (189 F. 2d at 586) we feel that its decision stands merely for the familiar proposition that where a union is seeking to negotiate, the employers' corresponding duty to bargain can be invoked only by a proper demand by the union. It does not appear that the Court intended to reject or even considered the proposition stated above (*supra,* pp. 18–20), that an employer's negative duty to abstain from direct dealings with his employees arises, once he learns of the union's majority status, regardless of whether or not the union has made a bargaining demand. Such direct dealings, we submit, violate Section 8 (a) (5) and nothing in the *Valley* case conflicts with this principle. On the contrary the Court's decision appears to sustain it. It stated (189 F. 2d at 587) that:

> Bargaining carried on by the employer directly with the employees, whether a minority or majority, who have not revoked their designation of a bargaining agent, would be subversive of the mode of collective bargaining which

> the statute has ordained, as the Board, the expert body in this field, has found.

Quoting the Supreme Court's decision in *Medo Photo Corp.* v. *N. L. R. B.,* 321 U. S. 678, 684, the Court recognized (189 F. 2d, at p. 586) that "it is a violation of the essential principle of collective bargaining and an infringement of the Act for the employer to disregard the bargaining representative by negotiating with individual employees . . ."

It is our view that the Court did not consider whether such direct dealings with employees were sufficient to support the Board's bargaining order. To the extent that the decision may be considered as holding such a finding insufficient to support a bargaining order we respectfully disagree with it.

#### 4. *The Board's bargaining order*

The Board's Order (R. 45–48) requires the Company, *inter alia,* to bargain upon request by the Union. This is the traditional manner in which the Board remedies violations of the bargaining obligation embodied in Section 8 (a) (5), whether the violation consists of a simple refusal by an employer to honor a bargaining request or whether the violation lies in in the employer's bypassing of the statutory representative and dealing directly with his employees. *N. L. R. B.* v. *Biles Coleman Lumber Company,* 98 F. 2d 18, 23 (C. A. 9) ; *Reeder Motor Company,* 96 N. L. R. B. No. 112, 28 L. R. R. M. 1596, 1597–1598.

Moreover, we submit that on the peculiar facts of this case, it is appropriate to require the Company to bargain even if the Court were to find only a violation

of Section 8 (a) (1) of the Act. Since, as we have seen (*supra,* pp. 5–6, 11–12), Zall's illegal inducement of the employees to abandon the Union (in violation of Section 8 (a) (1)), resulted in the destruction of its majority status, we urge that it is entirely equitable to require the Company to bargain with the Union on request, for, absent such a requirement, the Company can disregard the Union until it is able to muster a new majority, and reap the benefit of its own misconduct. *D. H. Holmes Co. Ltd.* v. *N. L. R. B.,* 179 F. 2d 876, 879–880 (C. A. 5); *International Broadcasting Corporation* (KWKH), 30 L. R. R. M. 1039, 1040; cf. *N. L. R. B.* v. *Bradford Dyeing Association,* 310 U. S. 318, 339–340.

## CONCLUSION

For the reasons stated it is respectfully submitted that the Board's order should be enforced in full.

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## APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. Supp. IV, Sec. 151, *et seq.*), are as follows:

"FINDINGS AND POLICIES

"SECTION 1. The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

* * * * *

DEFINITIONS

SEC. 2. When used in this Act—

(6) The term "Commerce" means trade, traffic, commerce, transportation, or communication among the several states * * *

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

* * * * *

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7;

* * * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).

* * * * *

SEC. 8 (b). It shall be an unfair labor practice for a labor organization or its agents—* * *

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9 (a);

* * * * *

REPRESENTATIVES AND ELECTIONS

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bar-

gaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment.

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. * * *.

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter

upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

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